

Before the
MARICOPA COUNTY AIR POLLUTION HEARING BOARD

In the matter of the appeal of)	
)	
Hickman's Egg Ranch, Permit No. 140062)	ORDER ON JURISDICTION
)	
Daniel E. Blackson, Appellant.)	Cause No. MCAPHB2016-01-PA
)	
)	

BEFORE:

Shane Leonard, Chair, Brian Davidson, Sine Kerr, Kim MacEachern, and Lucas Narducci, members, Maricopa County Air Pollution Hearing Board.

APPEARANCES:

Daniel E. Blackson appears pro se in an appeal of a minor permit revision issued to Hickman's Egg Ranch, Permit No. 140062. Robert C. Swan, Maricopa County Attorneys Office, represented the Maricopa County Air Quality Department, respondent.

PROCEDURAL HISTORY:

This matter comes before the Maricopa County Air Pollution Hearing Board (Board) as an appeal by Daniel E. Blackson (Blackson) from the grant by the Maricopa County Air Quality Department (Department) of a requested minor permit revision to revise Non-Title V Air Quality Permit No. 140062 for Hickman's Egg Ranch (Hickman) located near Tonopah. On November 16, 2015, Hickman filed a minor permit revision application seeking to add eight diesel-fueled emergency generators and two propane-fueled boilers to provide hot water for egg washing operations. *See* Non-Title V Technical Support Document (TSD), at 1. On April 19, 2016, Blackson filed comments raising concerns about the proposed permit. On June 10, 2016, the Department issued the minor permit revision without any changes requested by Blackson. On July 12, 2016, Blackson filed this appeal with the Board.

On August 1, 2016, the Department filed a motion to dismiss the permit appeal as beyond the scope of the minor permit revision or, in the alternative, to restrict the appeal to only the issues related to the minor permit revision.

On August 16, 2016, the Board reviewed the answer filed by MCAQD and heard argument from Mr. Blackson and Mr. Swan representing MCAQD. The Board deferred

action on the jurisdictional arguments to give Mr. Blackson time to prepare a response. Both MCAQD and Mr. Blackson filed briefs on jurisdictional issues on August 29, 2016.

ANALYSIS:

The County argues two major points in support of its contention that the Board does not have jurisdiction over Mr. Blackson's appeal: (1) Blackson is not properly before the Board; and (2) the Board's review is limited to the Control Officer's *action* approving the minor permit revision adding 8 emergency generators and 2 boilers. In response, Mr. Blackson argues that this is an *appealable agency action* and that any topic touched upon by his comments is within the Board's purview.

A.R.S. § 49-482 states as follows:

Within thirty days after notice is given by the control officer of approval or denial of a permit, permit revision, or conditional order, the applicant and any person who filed a comment on the permit or permit revision pursuant to section 49-480, subsection B and section 49-426, subsection D, or on the conditional order pursuant to section 49-492, subsection C, may petition the hearing board, in writing, for a public hearing, which shall be held within thirty days after receipt of the petition. The hearing board, after notice and a public hearing, may sustain, modify, or reverse the action of the control officer.

A.R.S. § 49-482.A. Section 49-482 ties the scope of the Board's review to the Control Officer's action, in this case issuance of the minor permit revision. The "the" before "action of the control officer" relates back to the control officer's action stated in the prior sentence. Hence, we agree that A.R.S. § 49-482 limits our jurisdiction to review of the control officer's action, the approval of the minor permit revision adding 8 engines and 2 boilers, and not the underlying permit. A.R.S. § 49-480.02, which refers to A.R.S. § 49-482, does not expand the scope of the Board's jurisdiction. *See, e.g.*, A.R.S. § 49-480.02.A.

Mr. Blackson's claim to broader review thus must rise or fall on whether this is an "appealable agency action" within the meaning of the Regulatory Bill of Rights, codified at A.R.S. § 49-471 *et seq.* The Regulatory Bill of Rights defines an "appealable agency action" as follows:

(a) Means an action that determines the legal rights, duties or privileges of a party.

...

(d) Does not include a decision or action that must be appealed to the hearing board pursuant to section 49-476.01, 49-480.02, 49-482, 49-490 or

49-511 or to a final administrative decision obtained by an administrative appeal under section 49-471.15.

A.R.S. § 49-471.4(a) & (d). Permit actions are appealed pursuant to sections 49-480.02 and 49-482 and therefore this action is not an “appealable agency action” within the meaning of the Regulatory Bill of Rights. This point is made emphatically in A.R.S. § 49-471.15, which states:

A person whose legal rights, duties or privileges were determined by an appealable agency action or who will be adversely affected by an appealable agency action and who exercised any right to comment on the action provided by law, rule or ordinance may appeal the action to the air pollution hearing board ... ***except that administrative appeals of decisions to approve, deny or revoke a permit, permit revision or conditional order are governed by sections 49-480.02 and 49-482*** and hearings on orders of abatement are governed by section 49-490.

A.R.S. § 49-471.15.A (emphasis added). Based upon this language, we conclude that while Mr. Blackson may raise any issue in comments, the Board may only act on the control officer's action, in this case the minor permit revision, not the underlying permit.

MCAQD further urges the Board to adopt a narrow reading of what comments justify an appeal, limiting them to only those issues that go to the approvability of the minor permit revision, in this case the addition of 8 emergency generators and 2 boilers. Mr. Blackson urges that the Board can act based on any reason set forth in comments. As set forth above, the Board cannot reach the underlying permit. The question is whether the Board can rely upon any reason—including issues with the underlying permit—to reject the minor permit revision. We believe that Arizona law does not support this broad contention. First, applications for permit revisions “need supply [application information] only if it is related to the proposed change.” Maricopa County Air Pollution Control Regulation (MCAPCR), Rule 220, § 301.4(a); *see also* 40 C.F.R. § 70.5(a)(2). It seems incongruous to review a permit based on information unrelated to the application and not included in the record. Second, the Regulatory Bill of Rights states that a person is “entitled to have the control officer not base a permitting decision under this article in whole or in part on conditions or requirements that are not specifically authorized by a provision of this state's law as provided in section 49-471.10, subsection C.” A.R.S. § 49-471.01.A.7; *see also* A.R.S. § 49-471.10.C. In light of this policy, the Board holds that the basis for rejecting the control officer's *action* must be related to the statutory and regulatory requirements for the *action before the Board* and not the underlying permit.

Further support for this position is found in A.R.S. § 49-480, which provides that “procedures for the review, issuance, revision and administration of permit issued pursuant to this section ... shall impose no greater procedural burden on the permit applicant” than procedures applicable to state permits. A.R.S. § 49-480.B. State law for

state permits clearly states that “[g]rounds for comment are limited to whether the proposed permit meets the criteria for issuance prescribed in this section or in section 49-427.” A.R.S. § 49-426.D. While technically limited to title V permits (for major sources), it would be unusual if a broader test were used for a non-Title V source. Accordingly, we conclude that comments which can be urged as a basis for rejecting or modifying the control officer’s action are limited to those which go to the statutory and regulatory criteria for issuance of the specific permit revision at issue.

Based upon the foregoing analysis, the Board enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

1. On November 16, 2015, Hickman’s Egg Farm applied for a minor permit revision seeking to add 8 diesel-fueled emergency generators and 2 propane-fueled boilers. *See* Non-Title V Technical Support Document (TSD), at 1.
2. On April 19, 2016, Blackson filed comments on the permit application and proposed permit, raising substantially the issues presented in this appeal.
3. On June 10, 2016, MCAQD issued a minor permit revision to Hickman’s Egg Farm.
4. On July 12, 2016, Blackson filed an appeal with this Board.

CONCLUSIONS OF LAW:

1. Blackson’s appeal was timely filed. A.R.S. § 49-482; APHB Manual § 3.6(B); *see also Thielking v. Kirschner*, 176 Ariz. 154, 859 P.2d 777 (Ct.App.Div.1 1993).
2. Based on the analysis set forth above, the Board’s jurisdiction extends only to the minor permit revision and not the underlying permit. *See* A.R.S. § 49-482 (review limited to the action of the control officer).
3. The Regulatory Bill of Rights’ “appealable agency action” provisions do not apply to a permit appeal required to be processed pursuant to A.R.S. § 49-482. *See* A.R.S. § 49-401.4(d); § 49-471.15.C.
4. Under A.R.S. §§ 49-480 and 49-426, the grounds of comment upon which the Board can take action are “limited to whether the proposed permit meets the criteria for issuance prescribed in this section [A.R.S. § 49-426] or in section 49-427.” *See* A.R.S. § 49-480.B (county procedures are limited to what state allows) & A.R.S. § 49-426.D (limiting state grounds of comment to whether criteria for issuance met).
5. Comment #1 goes to whether the operation is subject to the agricultural best management practices (BMPs) and dust generation. Whether the operation is or is not subject to the agricultural BMPs does not impact issuance of a permit for regulated engines or boilers. Similarly, the complaint about dust is not related to

- the engines or boilers. Comment #1 is beyond the jurisdiction of the Board on appeal.
6. Comment #2 complains that the Department has not considered "the ability to measure noxious chemicals and odorous components of chicken manure." This contention does not relate to the engines or boilers and is beyond the jurisdiction of the Board on appeal.
 7. Comment #3 states that there is an inadequate demonstration for hydrogen sulfide emissions from egg operations, but does not address the engines or boilers. Comment #3 is beyond the jurisdiction of the Board on appeal.
 8. Comment #4 is omitted from the appeal.
 9. Comment #5 is directed at odor complaints from general farm operations and not from the engines or boilers. Comment #5 is beyond the jurisdiction of the Board on appeal.
 10. Comment #6 is directed at manure hauling, which is beyond the jurisdiction of the Board on appeal.
 11. Comment #7 contends that the farm is a process industry, but this argument facially does not apply to the fuel burning equipment in the revision. Accordingly, this comment is beyond the jurisdiction of the Board on appeal.
 12. Comment #8 alleges that the Department failed to consider new source review issues and whether the units should have been included with an earlier permit. This issue is properly before the Board.
 13. Comment #9 alleges that VOC emissions from henhouses are non-fugitive. This issue is within the jurisdiction of the Board to the extent it implicates a failure of the Department to apply the proper new source review or permitting standards.
 14. Comment #10 goes to odor complaints unrelated to the engines and boilers covered by the permit revision and hence is beyond the jurisdiction of the Board on appeal.
 15. Comments #11, #13, #14, #17 allege errors and omissions in the application. To the extent that these errors or omissions may have resulted in the Department applying the incorrect permitting standard (e.g., major new source review, minor new source review, or Title V procedures) they are within the Board's jurisdiction.
 16. Comments #12, #15, #16 were omitted from the appeal.
 17. Comment #18 goes to odor, is not related to the engines or boilers, and is beyond the jurisdiction of the Board on appeal.

It is **ORDERED** as follows:

1. That the appeal as it relates to comments #1-#3, #5-#7, #10 and #18 is dismissed.
2. That the appeal as it relates to comments #8, #9, #11, #13, #14 and #17 is allowed, but evidence is limited to whether the Department properly calculated the emissions, characterized them as fugitive or point source, and, based upon the revised calculation, applied the proper permitting standards and procedures (e.g.,

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did the source trigger a procedure other than the one that the Department used to process the permit application and revision).

So ordered this 31st day of August, 2016.

A handwritten signature in black ink, appearing to read 'Shane Leonard', with a long horizontal flourish extending to the right.

Shane Leonard, Chair
Air Pollution Hearing Board